

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

* * * * *

IN THE MATTER OF APPLICATION FOR)	CONTESTED CASE HEARING
BENEFICIAL WATER USE PERMIT NO.)	DISMISSAL
41H-30001469 BY COOK-LEHRKIND)	AND
INVESTMENTS)	FINAL ORDER

* * * * *

BACKGROUND

This matter was referred for a contested case hearing after notice and upon the receipt of objections pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act. Prior to the hearing and submission of any pre-filed testimony, all objections in this matter were unconditionally withdrawn by the objectors and the objections were dismissed by the Department. Applicant Cook-Lehrkind Investments subsequently filed a Waiver of Hearing and Opportunity to Present Additional Evidence on July 16, 2008. Therefore, the **contested case hearing is dismissed** and cancelled, and the record for a final decision in this matter is limited to the information in the Department file.

FINDINGS OF FACT

General

1. Application for Water Use Permit No. 41H-30001469, submitted in the name of Cook-Lehrkind Investments and signed by Gene Cook was filed with the Department on March 27, 2002.
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate 655.00 gallons per minute (gpm) up to 277.00 acre-feet of ground water per year. The water is to be diverted in the SE¼NW¼SW¼ of Section 20, Township 1 South, Range 5 East, Gallatin County, Montana. The proposed means of diversion are two wells. One well (referred to as Well #3 in the Application) is 146 feet deep, includes a 15.00 horsepower pump, and is located in Phase 4 of the Valley Grove Subdivision. The second well (referred to as Well #4 in the Application) is 162 feet deep, includes a 20.00 horsepower pump,

and is located in Phase I of the Valley Grove Subdivision. The proposed use is multiple domestic use (which includes in-home uses as well as lawn and garden watering) in the Valley Grove Subdivision. The two wells for which this application is made are intended to allow the expansion of the subdivision but also to supplement and provide a level of redundancy with the two wells that were previously permitted to serve the initial phases of the subdivision (Permit No. 84093-41H for Well #1 and Permit No. 100773-41H for Well #2). All four wells are manifold together and integrated into a single community water system that serves the Valley Grove Subdivision. The two new wells would provide water for an additional 180 households using 56.50 acre-feet for in-home domestic purposes year-round, and 220.50 acre-feet for lawn and garden watering of an additional 88.20 acres from April 15 to October 15 each year. The proposed place of use is in the S1/2 of Section 20, Township 1 South, Range 5 East, Gallatin County, Montana.

4. Two separate public notices were provided on the application. After the first public notice was published in the Bozeman Chronicle on November 26, 2003 the Department received one timely objection by Bill Marx on December 24, 2003.

5. After this application was submitted, the Department adopted new rules defining minimum filing requirements and review procedures for water use permit applications, effective January 1, 2005. (Administrative Rules of Mont. §§ 36.12.101-122, 36.12.1301-1802).

6. A hearing was held on January 18, 2005. Hearing Examiner Mary Vandebosch issued an Order Remanding Application for Republication and Written Determination by Hydrogeologist dated August 10, 2005. Hearing Examiner Vandebosch found that the November 26, 2003, public notice was inadequate and that it was in the interest of justice for the Department to provide for republication of an accurate notice. Further, Hearing Examiner Vandebosch found that the Department's review of the application had not conformed with Department policy implementing the Stipulation and Order Regarding Count 1 of Amended Complaint (dated May 10, 2004) in the 1st Judicial District Court decision, Montana Trout Unlimited, et. al. v. Montana Department of Natural Resources and Conservation (Cause No. ADV-2003-444). Department policy and the Stipulation required that a Department hydrologist make a written determination that the applicant submitted sufficient evidence on which to base a determination whether the ground water was immediately or directly connected to surface water (whether the cone of depression or radius of influence of the wells will or will not induce surface water infiltration). The Department file in this case did not include such a written determination. Hearing Examiner Vandebosch remanded the application and ordered the hearing continued until after a written determination by a hydrologist

was made and the period for filing objections set forth in an accurate, republished notice had expired.

7. On April 11, 2006, the Montana Supreme Court ruled in Montana Trout Unlimited v. Department of Natural Resources and Conservation, 2006 MT 72, 331 Mont. 483, 133 P.3d 224 (2006) (hereafter Montana TU v. DNRC). This decision applied to DNRC's processing of all future and pending water use permit applications, including this application, seeking the use of ground water in the Upper Missouri River Basin Closure (basin closed to new appropriations of surface water, and to the use of ground water "immediately or directly connected to surface water." See § 85-2-343 (2005), MCA. Applicant received a letter dated June 20, 2006, from DNRC explaining the Supreme Court decision and stating that additional hydrologic information was required for review of the application consistent with Montana TU v. DNRC. The letter stated that the applicant is required to submit proof that the ground water applied for is not "immediately or directly" connected to surface water, including a showing that the well would not involve the prestream capture of tributary groundwater.

8. Applicant provided additional hydrologic information as required by Hearing Officer Vandebosch and the June 20, 2006 letter over the course of 2006 and early 2007. Letters were exchanged between DNRC and the Applicant as to the adequacy of this information. Department Hydrogeologist Bill Uthman summarized his completed review of the hydrogeological information provided for this application in an e-mail to DNRC Water Resources Specialist Porter Dassenko dated March 1, 2007.

9. The application was amended in three ways by letter from the applicant dated April 16, 2007. The purpose was changed from domestic and irrigation to multiple domestic including lawn and garden, the volume of water requested was increased from 265 to 277 acre-feet per year, and the period of use was reduced from year-round to April 15 through October 15 for the volume of water to be used in lawn and garden watering. It appears that the reason the purpose was amended by the applicant was to allow this application to qualify for the general "domestic" exception to the Missouri Basin closure statute (§ 85-2-343(2)(c) (2001)), regardless of whether it qualified for the "not immediately or directly connected to surface water" ground water exception (§ 85-2-342(2) (2001)) as defined in Montana TU v DNRC. The Applicant's April 16, 2007 letter amending the purpose states that DNRC has historically considered lawn and garden watering as a part of, and not distinct from, domestic beneficial use. Further, the applicant believes there is no distinction between "domestic" and "multiple domestic" uses under the basin closure statute,

because the exception in the basin closure statute refers to the character or type of use, and does not limit the size or number of domestic uses. (See Findings of Fact #23 and 24).

10. Applicant submitted Application to Change Water Rights No. 41H-30027289 to mitigate potential adverse effects to senior surface water users from the prestream capture and consumption of ground water under this permit application on March 29, 2007.

11. Pubic notice of this permit application, including the amendment of the purpose of use to multiple domestic, was published in the Bozeman Chronicle a second time on July 25, 2007. This notice included as “important information” that change application No. 41H-30027289 “. . . is designed to mitigate adverse [e]ffects (sic) that may occur with this permit.” A timely objection was received from Helen B. Collier on August 13, 2007. A Hearing Notice and Appointment of Hearing Examiner and a Notice of First Pre-Hearing Conference were mailed to Applicant Cook-Lehrkind Investments and Objectors Bill Marx and Helen B. Collier on June 19, 2008. An Objection Withdrawal form signed by Helen B. Collier dated June 30, 2008 was received by the Department on July 2, 2008.

12. A telephonic pre-hearing conference was held on July 2, 2008. Despite notice of the conference, Objectors Bill Marx and Helen B. Collier did not participate. A First Pre-Hearing Conference Report; Dismissal of Objections; and Scheduling Order was mailed to the parties on July 7, 2008. This Order directed Objector Bill Marx to contact the Department by July 11, 2008 or he would be defaulted and his Objection dismissed. Mr. Marx telephoned the Hearing Examiner on July 14, 2008 and verbally confirmed the unconditional withdrawal of his objection.

13. Applicant Cook-Lehrkind submitted a signed Waiver of Hearing and Opportunity to Present Additional Evidence to the Department on July 18, 2008. This Final Order dismisses the noticed hearing and presents the Department’s final decision in this matter based on the information in the Department file as that information addresses the statutory criteria for issuance of a water use permit in § 85-2-311, MCA (2001). This application is being judged on the law that was in effect when it was submitted. HB 831 (now §85-2-360 *et seq.*, MCA (2007)) is not applicable because it expressly does not apply to pending applications. 2007 Mont. Laws § 31, Ch. 391.

Physical Availability

14. Applicant submitted test-pumping information for Well #3. Well #3 was pumped at a constant 250 gpm for 24 hours. No drawdown was observed in an observation well located 120 feet away. Drawdown in Well #3 during pumping stabilized after pumping for 8.5 hours, and the static water level recovered within an hour after pumping ceased.

15. Applicant submitted a 23.5 hour drawdown yield test at a rate of 440 gpm for Well #4. Department hydrogeologist Bill Uthman, in an e-mail dated March 1, 2007 to Porter Dassenko, stated that the well testing information submitted by the Applicant for Well #4 was sufficient to indicate that Well #4 is capable of producing water in the amount and for the period requested.

16. I find that the two wells can produce the requested flow rate and volume of water.

Legal Availability

17. Using the Theis Equations, Applicant's consultant calculated a zone of influence of 3200 feet from both wells based on aquifer testing results from the first three wells (Well #4 had not been drilled at the time). The consultant calculated transmissivity of the aquifer at this location to be 9461 gallons per day per foot. Outside this radius, drawdown to the aquifer is projected to be 0.01 feet or less each year. For each of the wells, the radius of influence at which drawdown to the aquifer was projected to be 0.1 feet or less per year is 275 feet. The only wells within the 275 foot radius of the combined wells are the other wells in this public water system owned by the Applicant. All water right owners within the 3200 feet zone of influence received public notice of the application.

18. Department hydrogeologist Bill Uthman reviewed the application and determined that the aquifer is not hydraulically connected to surface water within the 3200 foot zone of influence because there is a 57-foot unsaturated zone overlying the source aquifer and clay strata are numerous in proximity to the wells. Induced surface water infiltration cannot occur as a result of pumping these wells.

19. The source aquifer is alluvial and contributes to surface water flows downstream in the Gallatin River. Pumping of these wells will result in prestream capture of ground water that would diminish surface flows in the future if not mitigated. A mitigation plan has been proposed in Application to Change No. 41H-30027289. I find that water for the two wells is legally available if operated in conjunction with the implementation of the mitigation plan discussed in Finding of Fact #21 below.

Adverse Effects

20. The appropriation works are wells with pumps that can be turned off by electric switches upon receiving a valid call for water from a senior water right holder.

21. To address potential adverse effects from the prestream capture of ground water that could diminish downstream surface water flows, the Applicant has submitted a Change Application to mitigate such impacts and potential adverse effects to downstream surface water users. Change

Application No. 41H-30027289 is intended to allow the Applicant to divert surface water for recharge of the source aquifer intended to be used under this Permit Application in at least the amount that downstream surface water would be reduced by consumptive water use in the Valley Grove Subdivision under this permit. Applicant's consultant estimated that the amount of water that would be consumed by the Valley Grove subdivision under this permit would be 223.3 acre-feet per year, 2.8 acre-feet per year of which would be attributable to the in-home use and 220.5 acre-feet of which would be attributable to lawn and garden watering. The reduction in flows would occur to the reach of the Gallatin River between Belgrade and Manhattan, near Central Park, about nine miles northwest of the subdivision. Mitigation would occur through the retirement of 170.47 acres of irrigation under Statement of Claim Nos. 41H-7061 (priority date October 15, 1866) and 41H-7062 (priority date July 1, 1894). The mitigation plan calls for continuing to divert 1.4 cfs over the 134-day historic period of use at the historic point of diversion through the Lower Middle Creek Supply Ditch to the Beck Border Ditch, but instead of being diverted to the historically irrigated place of use would continue to flow into McDonald Creek and 0.91 cfs into an infiltration trench in the area of Central Park or the E2, Sec. 19, T1S, R4E, Gallatin Co. The plan has been reviewed by Department hydrogeologist Russell Levens, who in a Memorandum to Porter Dassenko, Water Resources Specialist in the Bozeman Water Resources Regional Office dated April 30, 2008, stated that this plan will mitigate for the consumptive use of the Valley Grove Subdivision and any potential adverse effects upon surface water flows from the prestream capture of connected ground water in terms of volume, location and timing. Mr. Levens' memo states ". . . the rate and timing of accretion to the affected reach as a result of the proposed mitigation should be approximately equal to the rate and timing of net depletion caused by the proposed new use because of the proximity of the infiltration trenches to the proposed new well and the distance to the affected reach." Mr. Levens also recommended that the applicant be required to measure flows and ground water levels as part of the change approval to ensure the mitigation plan functions as planned. This Order makes no representation as to whether Change Application No. 41H-30027289 should be approved by the Department. I find that the mitigation plan would preclude adverse effects to downstream surface water right holders.

Adequacy of Diversion Works

22. Both wells were drilled by a licensed water well contractor in accordance with the rules of the Montana Board of Water Well Contractors. The wells were grouted with continuous feed bentonite during the installation to avoid contamination. The public water supply and distribution

system has been approved by the Montana Department of Environmental Quality (PWSID # MT0003780). I find that the diversion works are adequate.

Beneficial Use

23. Domestic uses are beneficial uses under Montana law. The Department has granted permits for multiple domestic uses in subdivisions for decades. The two additional wells that are the subject of this application would provide water for in-house uses to 180 additional single-family homes in the subdivision year round and the application requests 56.5 acre-feet per year for this purpose. The same two wells under a multiple domestic use would also provide lawn and garden watering for 88.2 acres for the same 180 homes. This averages out to ½ acre of lawn and garden per lot. Using the standard in the U.S. Natural Resource and Conservation Service's Irrigation Guide of 2.5 acre-feet per acre for turf during the growing season, the application requests 220.5 acre-feet per year for this purpose. These water use estimates are sufficient for the number of lots and homes.

24. The two additional wells will also provide a back-up source of water for the other 173 lots in the Valley Grove Subdivision. The four wells that would comprise the entire public water system are physically manifold together and pumped sequentially. For this reason, the instantaneous flow rates requested for each well are required to be greater than what may be necessary just to serve a portion of the subdivision.

25. I find that the proposed flow rates and volumes for multiple domestic beneficial use are sufficient and not wasteful.

Possessory Interest

26. Applicant Cook-Lehrkind Investments has the possessory interest or the written consent of those with possessory interest in the property where the water will be put to beneficial use. Applicant controls the appropriation and distribution works of the community water system, even though it no longer owns all the property in the subdivision. Applicant will have consent prior to supplying water to any other property owners in the Valley Grove Subdivision, because Applicant will not supply water to any landowner without that property owner agreeing to subscribe to the community water system, which is by its nature, consent. Applicant has possessory interest in the proposed place of use.

Water Quality

27. No valid objections related to adverse effect on the water quality of a prior appropriator were received by the Department.

28. No objections were filed by the Department of Environmental Quality or a local water quality district pursuant to §85-2-311(1)(g), MCA.

29. No valid objections related to the ability of a discharge permit holder to satisfy effluent limitations of a permit were received by the Department.

Based upon the foregoing Findings of Fact and upon the record in this matter, I make the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water within the Upper Missouri River Basin closure area if an application qualifies for an exception as provided in §85-2-343, MCA and if the applicant proves the criteria in §85-2-311, MCA.

2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an **analysis** of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's **plan** for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. §85-2-311 (1) (a) through (h), MCA.

3. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. § 85-2-312, MCA. Montana Power Co. v. Carey, 211 Mont. 91, 96, 685 P.2d 336, 339 (1984).

Basin Closure

4. This application is subject to the statutes and rules in effect at the time the application was submitted, and not those that have been enacted since then. See Proposal for Decision In the Matter of of the Application for Beneficial Water Use Permit No. 24550-41QJ by Anderson Ranch(1984). The Montana Supreme Court decision in Montana Trout Unlimited v. DNRC applies retroactively. See Final Order In the Matter of Application No. 41D-30002459 by Big Hole Grazing Association & Montana Department of Transportation and Application No. 41D-30002460 by Big Hole Grazing Association (2006); see also Dempsey v. Allstate Insurance Company, 2004 MT 391, 325 Mont. 207, 104 P.3d 483.

5. The Montana TU v. DNRC decision established that the exception to the Upper Missouri Basin Closure for ground water that is not immediately or directly connected to surface water does not extend to new uses that involve the prestream capture of groundwater. The application in this case involves the prestream capture of ground water connected to surface water and therefore does not qualify for the ground water exception.

6. The purpose of this application was amended to multiple domestic use. Under the Upper Missouri Basin closure in effect at the time of this application, domestic use was exempt from the closure. § 85-2-343(2)(c)(2005), MCA. The term “domestic use” was not defined in statute or rule at the time this application was submitted. The Department has granted permits for multiple domestic use for decades. This practice was made into a rule with the adoption of definitions of “domestic” and “multiple domestic” in the 2005 rules.

A.R.M. 36.12.101 (21) now reads: “‘Domestic use’ means those water uses common to a household including:

- (a) food preparation;
- (b) washing;
- (c) drinking;
- (d) bathing;
- (e) waste disposal;
- (f) cooling and heating; and
- (g) garden and landscaping irrigation up to five acres.”

A.R.M. 36.12.101 (35) now reads: “Multiple domestic use’ means a domestic use by more than one household or dwelling characterized by long-term occupancy as opposed to guests. Examples are domestic uses by:

- (a) colonies;
- (b) condominiums;
- (c) townhouses; and
- (d) subdivisions.”

These rules reflect the long-held Department practice of including some amount of lawn and garden watering within the meaning of domestic use. Applicant is seeking an average of ½ acre of lawn and garden watering per lot, which is considerably less than the 5 acres allowed in the domestic definition. These rules also reflect the long-held Department practice that subdivisions are included within the meaning of multiple domestic uses. These rules were in effect when the purpose of the application was amended by the applicant.

7. Some might argue that the basin closure exception for domestic use was intended only for individual domestic uses and not for multiple domestic uses. Using that interpretation, each individual household would be exempt from the closure and eligible to apply for a water use permit, but the combined subdivision would not. This would lead to the situation where there could be 353 water use permits applied for within the Valley Grove Subdivision instead of the one that has been granted and this one that is pending. Such an interpretation is contrary to engineering efficiency, administrative economy and the long-held Department practice of including subdivisions within the meaning of multiple domestic uses. State v. Snider (1975), 168 Mont. 220, 226, 541 P.2d 1204, 1208 (where common practice exists and the Legislature has opportunity to provide otherwise and does not, a legislative intent to authorize such practice is presumed).

8. The Montana Supreme Court has recently weighed in on a similar question of defining what water use purposes are exempt under the Upper Missouri River basin closure. In Lohmeier v. State of Montana, DNRC and Utility Solutions, 2008 MT 307, the question of what is a “municipal” use was at issue. More specifically, was the municipal exemption limited to cities and unincorporated towns, or could such a use be claimed by a private utility? This decision states at paragraph 29: “. . . the character of the *use* rather than the character of the *applicant* has been the defining factor in determining whether an application could be considered as one within the municipal use category. . . .” In the present case, the character of the use rather than the size or

the number of the uses is the defining factor in determining whether an application could be considered as within the domestic use exemption.

9. This application for multiple domestic uses was properly processed by the Department under the domestic exception to the basin closure even though the appropriation results in the prestream capture of tributary ground water. That only means the application could be processed. It must still meet the substantive requirements of §85-2-311 MCA.

Physical Availability

10. Applicant has proven by a preponderance of evidence that water is physically available as required by §85-2-311(1)(a)(i) MCA (2001). (See Findings of Fact 14 through 16).

Legal Availability

11. Applicant has proven by a preponderance of evidence that water is legally available as required by §85-2-311(1)(a)(ii) MCA (2001). I reach this conclusion based on an analysis of the evidence of physical water availability as compared against the existing legal demands for this water, that the pumping of water from the wells will not induce surface water infiltration, and that a permit condition that no water may be appropriated under this permit prior to Department approval and implementation of Authorization to Change No. 41H-30027289 mitigates any potential adverse effects from prestream capture of ground water upon the use of a downstream surface water right. (See Findings of Fact 17 through 19 and 21). The Department has previously ruled that augmentation to mitigate adverse effects is allowed under the Upper Missouri River Basin Closure, and what the Department has done in this case allowing for augmentation (through a change authorization) to mitigate adverse effect is not new, and should not be seen as new to those familiar with the decisions of the Department that protect senior appropriators. See, e.g., In the Matter of Application for Beneficial Water Use Permit No. 41H-104667 and Application to Change Appropriation Water Right No. 41H-125497 by Ronald J. Woods, DNRC Final Order (June 1, 2000)(to ensure the pond is nonconsumptive, intake and outflow conveyances must be lined or conveyed by pipe. Evaporation must be replaced by some reduction in other uses. Here the water would be replaced by water made available through the change of another water right.); *In The Matter of Application To Change Appropriation Water Right No. 76GJ-110821 by Peterson and Montana Department of Transportation*, DNRC Final Order (2001); *In The Matter of Application To Change Appropriation Water Right No. 76G-3235699 by Arco Environmental Remediation LLC.*, Change Abstract (2003)(application had no objections; allows water under

Statement of Claim 76G-32356 to be exchanged for water appropriated out-of-priority by the permits at the wet closures and wildlife ponds to offset consumption arising at the wet closures and wildlife ponds with the priority date of Statement of Claim 76G-32356.); *In The Matter of Designation of the Larsen Creek Controlled Groundwater Area as Permanent*, Board of Natural Resources Final Order (1988)(requires augmentation); State v. Snider (1975), 168 Mont. 220, 226, 541 P.2d 1204, 1208 (where common practice exists and the Legislature has opportunity to provide otherwise and does not, a legislative intent to authorize such practice is presumed). A Montana district court has also recognized that augmentation may be used to address adverse effects, even if the permit application falls within the upper Missouri River basin closure. *Order After Remand of Petition for Judicial Review (2007)*, Faust et al. v. DNRC et al., Cause No. BDV-2005-443, Montana First Judicial District Court, Lewis and Clark County. See also *In the Matter of Application for Beneficial Water Use Permit Nos. 41H-30012025 and 41H-30013629 by Utility Solutions, LLC*, Final Order (November 9, 2006), on appeal, Faust v. DNRC and Utility Solutions, Cause No. CDV-2006-886, Montana First Judicial District; *In the Matter of Application for Beneficial Water Use Permit Nos. 41H-30019215 by Utility Solutions, LLC*, Final Order (July 24, 2007), on appeal, Montana River Action Network et al. v. DNRC and Utility Solutions, Cause No. CDV-2007-602, Montana First Judicial District, Lewis and Clark County. I find legal water availability based upon the specific mitigation plan presented by the Applicant.

Adverse Effect

12. Applicant has proven by a preponderance of evidence that the water rights of a prior appropriator will not be adversely affected as required by §85-2-311(1)(b) MCA (2001). I find no adverse effect based on a permit condition that no water may be appropriated under this permit prior to Department approval and implementation of Change No. 41H-30027289 mitigates any potential adverse effects from prestream capture of ground water upon the use of a downstream surface water right. (See Findings of Fact 20 and 21 and Conclusion of Law 11).

Adequacy of Diversion Works

13. Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate as required by §85-2-311(1)(c) MCA (2001). (See Finding of Fact 22).

Beneficial Use

14. Domestic use is a beneficial use. §85-2-102(4), MCA. Some reasonable amount of lawn and garden watering has historically been included as domestic use by the Department. For example, for Notices of Small Ground Water Appropriations (Form 602), the Department has traditionally included ¼ acre of lawn and garden watering within its definition of domestic purposes, before requiring any more explicit description of the beneficial use. The definition of “domestic use” in the Department’s rules includes up to five acres of garden and landscaping. A.R.M, 36.12.101 (21). Additionally, the Montana Water Court has always included lawn and garden watering within its interpretation of beneficial domestic use. The Water Rights Claims Examination Manual also states that lawn and garden areas of 2.5 acres or less per household included on a domestic statement of claim are presumed to be valid. (Water Rights Claims Examination Manual, Part 1, July, 2005, p. 412).

15. Applicant has proven by a preponderance of evidence that the proposed use is a beneficial use and are the amounts of water needed to sustain the proposed beneficial use. §85-2-311(1)(d) MCA (2001). (See Findings of Fact 23 through 25).

Possessory Interest

16. Applicant has proven by a preponderance of evidence that Cook-Lehrkind Investments has a possessory interest, or the written consent of the person with possessory interest, in the property where the water will be put to a beneficial use as required by §85-2-311(1)(e) MCA (2001). This finding is also consistent with current Admin R. Mont. 36.12.1802. (See Finding of Fact 26)

Water Quality

17. The criteria in §85-2-311(1)(f),(1)(g), and (1)(h) MCA (2001) do not apply because no valid water quality objections were received. (See Findings of Fact 27 through 29 and §85-2-311(2) MCA (2001)).

18. Applicant has proven, as herein conditioned, the criteria for issuance of a provisional permit. (See Findings of Fact 14 through 29) and §85-2-311, MCA (2001)).

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, I make the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41H-3001469 is **ISSUED** to Cook-Lehrkind Investments to appropriate 655.0 gpm up to 277.0 acre-feet of ground water per year for multiple domestic use. The water is to be diverted in the SE¼NW¼SW¼ of Section 20, Township 1 South, Range 5 East, Gallatin County, Montana. The means of diversion are two wells. One well is 146 feet deep, includes a 15.00 horsepower pump, and is located in Phase 4 of the Valley Grove Subdivision. The second well is 162 feet deep, includes a 20.00 horsepower pump, and is located in Phase I of the Valley Grove Subdivision. The use is multiple domestic use in the Valley Grove Subdivision. Combined, the two wells would provide multiple domestic use water for 353 households using 56.50 acre-feet for in-home uses year-round, and 220.50 acre-feet for lawn and garden watering of 178.50 acres from April 15 to October 15 each year. The proposed place of use is in the S1/2 of Section 20, Township 1 South, Range 5 East, Gallatin County, Montana.

A. This permit authorization is conditioned on the approval and implementation of Authorization to Change No. 41H-30027289. Authorization to Change No. 41H-30027289 will include a measurement condition or conditions to insure that the mitigation plan functions as planned to avoid adverse effects to downstream surface water right users. Appropriator may not exercise the issued Permit prior to approval and implementation of Authorization to Change No. 41H-30027289. Nothing in this Order shall be construed as having granted or approved the required change.

NOTICE

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

DATED this 9th day of October, 2008.

/Original signed by R Curtis Martin/
R. Curtis Martin, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the CONTESTED CASE DISMISSAL AND FINAL ORDER was served upon all parties listed below on this 9th day of October, 2008 by first class United States mail:

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